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CHARLES ELM

IN THE

Supreme Court of the United States

October Term, A. D. 1932.

No. 585-586

In the Matter of THE AMERICAN BOND AND MORTGAGE COMPANY, INCORPORATED, Alleged Bankrupt.

ROYAL INDEMNITY COMPANY, a New York Corporation, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DeFRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN and NEWELL BECKER,

(Appellants below) Petitioners,

against

THE AMERICAN BOND AND MORTGAGE COMPANY, INCORPORATED,

(Appellee below) Respondent.

BRIEF OF RESPONDENT, THE AMERICAN BOND AND MORTGAGE COMPANY IN OPPOSITION TO PETITION OF ROYAL INDEMNITY COMPANY, ET AL., FOR WRIT OF CERTIORARI.

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Opinions Below.

The opinion of the Circuit Court of Appeals (R. 283) is reported in 61 F.(2d) 875. The opinion of the District Court (R. 258) is not reported.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932.

In the Matter of THE AMERICAN BOND AND MORTGAGE COMPANY, INCORPORATED, Alleged Bankrupt.

ROYAL INDEMNITY COMPANY, a New York Corporation, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DeFRIEZ, BERTHA VERBY, FRANCES C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN and NEWELL BECKER,

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(Appellee below) Respondent.

BRIEF OF RESPONDENT, THE AMERICAN BOND AND MORTGAGE COMPANY, IN OPPOSITION TO PETITION OF ROYAL INDEMNITY COMPANY, ET AL., FOR WRIT OF CERTIORARI.

Preliminary statement.

In view of petitioners' failure to clearly set forth the nature of the proceedings below, we respectfully call attention of the Court to certain salient facts in the case. This additional summary, in accordance with the rule, we trust may be of assistance to the Court.

On September 5, 1931, the American Bond and Mortgage Company, (respondent herein) filed a voluntary petition in bankruptcy in the United States District Court for the Northern District of Illinois, Eastern Division,

(R. 1) and was adjudicated a bankrupt on said date (R. 3).

On September 10, 1931, Royal Indemnity Company, as an alleged creditor of the respondent herein made its motion in said voluntary bankruptcy proceedings for leave to file its petition for vacation of said order of adjudication and other relief, which motion was allowed on November 11, 1931 (R. 7).

On November 11, 1931, petitioner, Royal Indemnity Company, as an alleged creditor of the American Bond and Mortgage Company filed in said voluntary bankruptcy proceedings its sworn petition and supplement thereto praying that said order of adjudication in bankruptcy and general reference be vacated and set aside and that said voluntary petition in bankruptcy be dismissed, on alleged jurisdictional grounds (R. 9).

On February 2, 1932, respondent American Bond and Mortgage Company filed its amended answer denying that the petitioner Royal Indemnity Company was a creditor in the amount as alleged in its petition or in any other amount (R. 237-238).

On February 15, 1932, the individual petitioners herein as creditors of the respondent American Bond and Mortgage Company filed their sworn petitions similarly praying and adopting the said petition of the Royal Indemnity Company, its allegations and prayers (R. 249).

On February 25, 1932, respondent American Bond and Mortgage Company filed its answer to said petitions wherein it prayed that its said amended answer to the petition of the Royal Indemnity Company be permitted to stand and deemed to be an answer to the said intervening petitions (R. 257-258); that in and by said amended answer this respondent admitted that since the 22nd day of May, 1931, equity receivers had custody and

possession of its property and assets in the Northern District of Illinois but denied that it had not transacted business in the Northern District of Illinois and had no office therein and had not had its principal place of business therein (R. 239); that in and by said amended answer this respondent admitted that no meetings of its stockholders had been called or held for the purpose of authorizing said voluntary petition in bankruptcy but denied that under the laws of Maine only the stockholders in the meeting duly called could authorize the filing of a voluntary petition in bankruptcy and denied that Directors of a Maine corporation have no authority to authorize the filing of a voluntary petition in bankruptcy; that in and by said amended answer this respondent alleged that ninety-three per cent of the outstanding capital stock of the American Bond and Mortgage Company, a corporation, which alone had voting power then held by voting Trustees duly authorized the filing of said voluntary bankruptcy petition (R. 239-240).

On April 6, 1932, an order was entered after proceedings were had in accordance with Federal Equity Rule 29, making certain conclusions of law as follows (R. 262):

1. That the American Bond and Mortgage Company did not, because of the appointment of Equity Receivers on May 22, 1931 cease to do business on that day, and accordingly did not, on that date, cease to have a place of business in the Northern District of Illinois.
2. That the Royal Indemnity Company and said individual petitioners claiming to enjoy the status of creditors and no other status, can not raise the question as to the power or authority of the Board of Directors of the American Bond and Mortgage Company, a Maine corporation, to authorize the filing of a voluntary bankruptcy proceeding where said proceeding is filed in a court which otherwise has jurisdiction.

And in and by said order said petitioners were directed to close their proofs in support of their said petitions on or before April 21, 1932 (R. 263).

On April 21, A. D. 1932, the motion of the Royal Indemnity Company and the intervening petitioners for an extension of time in which to close their proofs was denied (R. 264).

On April 27, A. D. 1932, a report was filed by the Honorable Garfield Charles, as Special Master, setting forth that no evidence had been offered or produced in connection with said petitions and answers (R. 264-265).

On May 3, A. D. 1932, an order was entered denying the petition and supplemental petitions of the Royal Indemnity Company and the individual petitioners (R. 265-267) and the following findings made:

1. That said petitioners had failed to introduce any evidence in support of their said petitions.
2. That the time fixed by the order of court for the closing of proof on the part of said petitioners expired April 21, 1932.
3. That the points of law raised by said petitions and the answer of the bankrupt thereto had been decided adversely to said petitioners.
4. That at the time of the filing of the voluntary petition in bankruptcy by the American Bond and Mortgage Company, a corporation, and at the date of the order of adjudication in bankruptcy entered therein on September 5, 1931, the District Court of the United States, Northern District of Illinois, Eastern Division had jurisdiction to adjudicate the said American Bond and Mortgage Company, a corporation, a bankrupt and had jurisdiction of its person and property.

The questions involved.

From the statement of facts contained herein, it clearly appears that the petitioners appealed from two orders or decrees of the United States District Court for the Northern District of Illinois, Eastern Division, the first of said orders being of an interlocutory nature made after a hearing pursuant to Federal Equity Rule Number 29 and the second order being final in its nature denying the said petitions.

The said interlocutory and final orders appealed from were affirmed by the United States Circuit Court of Appeals for the Seventh Circuit.

It is, therefore, submitted that the sole and only questions involved in the proceedings before the District Court or the Circuit Court of Appeals were confined to the following two questions:

1. Whether the American Bond and Mortgage Company because of the appointment of equity receivers on May 22, 1931 ceased to have its principal place of business in the Northern District of Illinois.
2. Whether the petitioners claiming to enjoy the status of creditors and no other status, could raise the question as to the power or authority of the Board of Directors of the American Bond and Mortgage Company, a Maine corporation, to authorize the filing of a voluntary bankruptcy proceeding, where such a proceeding is filed in a court which otherwise has jurisdiction.

Neither the District Court nor the Circuit Court of Appeals of the Seventh Circuit, for the purpose of their decisions, found it necessary to pass upon or to construe Section 63 of Chapter 56 of the Revised Statutes of Maine (1930) so that in this brief we shall deal only with

the second and third points stated in the petition (R. 20-24) although we controvert the contention that a stockholders vote was required under the Maine statute.

Point I.

The decision of the Court of Appeals does not present any conflict with the decisions of other United States Courts of Appeal upon any point involved, but is in harmony with the decisions of other United States Courts of Appeal and United States District Courts on the points involved.

1-A. The power or authority of the Board of Directors to authorize the filing of a voluntary petition in bankruptcy on behalf of a corporation can not be questioned or raised by a creditor.

Ann Arbor Machine Corporation, 274 F. 24-29 (C. C. A. 6th).

In re Guanacevi Tunnel Co., 201 F. 316-318 (C. C. A. 2nd).

In re A. C. Wagy & Co., 22 F. 2d 9-11 (C. C. A 9th).

In re E. T. Russell Co., 291 F. 809 (D. C. Mass.).

In re United Grocery Co., 239 F. 1016 (D. C. Fla.).

In re Hargadine-McKittrick Dry Goods Co., 239 F. 155 (D. C. Mo.).

In re Pneumatic Tube Steam Splicer Co., 60 F. 2nd 524 (D. C. Md.).

1-B. The American Bond and Mortgage Company did not, because of the appointment of equity receivers cease to have its principal place of business in the Northern District of Illinois.

In re Guanacevi Tunnel Co., 201 F. 316-19 (C. C. A. 2d).

In re American and British Manufacturing Corporation, 300 F. 839-846 (D. C. Conn.).

In re Moench & Sons Co., 130 F. 658-686 (C. C. A. 2d).

In re E. & G. Theatre Co., 223 F. 657 (D. C. Mass.)

Also see

In re Petition of Shortridge, et al., 20 F. 2d 638-639 (C. C. A. 9th).

Struther's Furnace Co. v. *Grant,* 30 F. 2d 576-77 (C. C. A. 6th).

Counsel for petitioners cite *in re Perry Aldrich Co.,* 165 F. 249 (D. C. Mass.) as conflicting with the decision of the Circuit Court of Appeals. It is submitted that upon an examination of the facts of said case, the Court will find there is no real analogy with the facts in the present case. It is to be especially noted that the Perry Aldrich Co. had ceased to have a principal place of business in the State of Massachusetts more than four months prior to the time the equity receivers were appointed and the equity receivers had no authority to carry on the business of the Perry Aldrich Co. so that the court in Massachusetts did not have jurisdiction to adjudicate the Perry Aldrich Co. a bankrupt irrespective of the question as to whether the appointment of equity receivers amounted to a cessation of business on the part of the corporation or deprived it of its principal place of business. It is, therefore, submitted that there is no conflict between the *Perry Aldrich Co. case* and the decision of the Circuit Court of Appeals.

The case of *Commerce Trust Co.* v. *Chandler,* 295 Fed. (1st C. C. A.) 241, cited by petitioners as in conflict with the decision in the Seventh Circuit at bar was a proceeding in equity—not bankruptcy.

No creditor has a right to complain that a person surrenders his property for distribution under the bankruptcy laws—whether solvent or not. A creditor does have a right to contest claims against an insolvent estate—and that is all that is held in the *Commerce Trust case*. Counsel are in error when they contend a conflict is presented between the two Circuit Courts of Appeal.

Point II.

No important question of federal law is involved which has not been or should be settled by this Court.

Section 2(1) of the Bankruptcy Act of 1898 as amended is clear and unambiguous in its terms

> "to (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction."

and inasmuch as the question as to whether a corporation had its principal place of business in a given District for the required length of time is an issue of fact, no judicial interpretation of said section of the Bankruptcy Act was necessary.

The only effect of the decision of the Circuit Court of Appeals is to provide for the administration of the estate of the respondent in the Northern District of Illinois.

The United States District Court of Maine on petitions to transfer the involuntary petition there pending to the District of Illinois under section 32 of the Bankruptcy Act (11 U. S. C. A. section 55) and General Order Num-

ber 6 (11 U. S. C. A. 53) held that the estate of this respondent can be administered for the greatest convenience of parties in interest in the Northern District of Illinois and has ordered the transfer of said Maine involuntary proceeding to Illinois to be consolidated with either the involuntary petition or the voluntary proceeding pending in Illinois.

In re American Bond and Mortgage Company, 58 F. 2d 379 (D. C. Maine).

For other cases emphasizing the practical importance of the location of the principal place of business of this respondent see *In re American Bond and Mortgage Company,* 50 F. 2d 441 (D. C. Maine), affirmed in 51 F. 2d 60 (C. C. A. 1).

Point III.

The decision of the Circuit Court of Appeals does not conflict with applicable decisions of this Court.

The decisions of this Court in *Price* v. *United States,* 269 U. S. 492, 502, and *United States* v. *Butterworth,* 269 U. S. 504, are not applicable. In the *Price* and *Butterworth cases* this Court held that consent receiverships where the defendant is admittedly insolvent is equivalent to a voluntary assignment of all its property within the meaning of Section 3466 United States Statutes and that the United States was entitled to priority of its claim for unpaid taxes. These decisions do not hold that the receivership would amount to a voluntary assignment for all purposes but merely that it brought the corporation within the Revenue Act so that the government was entitled to priority of payment on its claim. These two cases were companion cases to *Bramwell* v. *United States Fidelity Co.,* 269 U. S. 483, which they both cite, and in which Mr. Justice Butler said: "It is a rule of universal application that general expressions used in a court's

opinion are to be taken in connection with the case under consideration. *Cohens* v. *Virginia*, 6 Wheat 264, 399."

The case of *United States* v. *Whitridge*, 239 U. S. 144, is not in conflict with the decision of the Circuit Court of Appeals. There an excise tax had been levied on corporations for the doing of business in purely corporate capacity and the ground for the tax was the possession of the advantages of the usual corporate forms and agencies. Manifestly, a corporation is not enjoying the full advantages of such corporate forms and agencies when those agencies are displaced by a receivership. The holding there is not that the fact receivers are carrying on the corporation's business prevents the corporation having a principal place of business.

All of said cases involve corporations which were in the process of winding up their affairs while the equity receivership of this respondent is purely a conservation proceeding. (R. 39-42, 44, 45.)

As far as the record in this case is concerned, this respondent at the time of the filing of the equity proceedings (R. 35) and the appointment of receivers, and at all times thereafter was solvent and was a going concern. (R. 38.)

This Court has always recognized the distinction between equity receiverships which have for their purpose the conservation of the property of the defendant and statutory creditors' bills which have for their purpose the winding up of the affairs of insolvent corporations.

In re Michigan v. *Michigan Trust Co.*, 286 U. S. 334-346.

Point IV.

The petition for writ of certiorari should be denied.

This case is not one that should be reviewed by this Court. No question of public interest is presented. The decisions are not in conflict. The respondent is bankrupt. It was so adjudicated in the Seventh Circuit on September 5, 1931, and likewise adjudicated in the District of Maine on October 14, 1931. What petitioners really desire is to have the administration in Maine (where the company had only a paper charter) and not in Illinois where it had its place of business.

Judge Peters (D. J. Maine) has heretofore ordered the proceedings in Maine transferred to the Illinois District and aptly noted that so far as administration was concerned "probably Maine would be the last considered of all the states east of the Mississippi River." 58 Fed.(2) 379, at page 382.

Dated February 4, 1933.

Respectfully submitted,

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CHARLES EL

IN THE

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Nos. 585 and 586.

ROYAL INDEMNITY COMPANY, PARKES D. WENDELL, CHARLES T. TRIGG, CHARLES M. WINCHESTER, LLOYD S. CHENEY, WILLIAM LAWRIE, S. J. BENNETT, KATIE DEFRIEZ, BERTHA VERBY, FRANCIS C. LOSEE, DR. M. A. LOSEE, J. L. HONE, AGNES E. LARKIN, RALPH W. ELDREDGE, JESSE H. OWENS, DANIEL LARKIN AND NEWELL BECKER,

Petitioners,

against

AMERICAN BOND & MORTGAGE COMPANY, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

WILLIAM E. LEAHY,
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Petitioners,

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AMERICAN BOND & MORTGAGE COMPANY, *Respondent.*

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 283) is reported in 61 F. (2d) 875. The opinion of the District Court is not reported but may be found in the Record at page 258.

QUESTIONS PRESENTED.

1. The jurisdictional question hereinafter referred to (p. 8).

2. Was the principal place of business of the Bankrupt affected by the appointment of Equity Receivers who operated the business of the Bankrupt during the greater portion of the six months next preceding the filing of the voluntary petition?

3. Are general creditors permitted to move to vacate an adjudication made in a voluntary bankruptcy proceeding where the Board of Directors and Voting Trustees holding ninety-three per cent of the outstanding capital stock of the Bankrupt Company duly authorized the filing of said voluntary petition (R. 2, 239, 240), on the ground that a Maine statute requires that for the protection of "Minority Stockholders" an annual or special stockholder's meeting must be held in case of a proposed, "sale, lease or consolidation."

STATUTES INVOLVED.

The pertinent sections of the Bankruptcy Act and Chapter 56 (Sec. 63), Rev. Stat. of Maine 1930, are printed in Appendix B and Appendix C, respectively, of the present brief.

STATEMENT.

Petitioners' brief commingles the case at bar with collateral matter. It is therefore deemed necessary to submit the following statement of the case to clarify.

On September 5, 1931, American Bond & Mortgage Company, a Maine corporation, filed a voluntary petition in bankruptcy in the District Court, Northern District of Illinois, Eastern Division, and was thereupon adjudicated bankrupt (R. 1-2). The Petition was filed pursuant to direction of its Board of Directors (R. 2), supported by the vote of voting trustees, holding ninety-three (93) per cent of

the outstanding common capital stock which alone had voting power (R. 239, 240, par. 25). A *formal* stockholders meeting was not called (R. 239) to authorize the petition. Motion for appointment of a receiver was made and continued to September 10, 1931 (R. 4). Upon adjudication due reference was made to a Referee for further proceedings under the statute (R. 4).

Thereupon, five days later, on September 10, 1931, Petitioner Royal Indemnity Company moved for leave to petition in the alternative either that the adjudication be vacated and the petition be dismissed or that pursuant to General Order No. 6, all proceedings be stayed until determination of an involuntary petition then pending in Maine (R. 6-8) (R. 27). The motion for leave to file was granted (R. 7) and Petitioner Royal Indemnity Company thereupon filed its petition (R. 9-27) as stated, and then by way of supplemental petition withdrew its prayer for a stay order under General Order No. 6 (R. 8).

Grounds of Petition to Vacate Adjudication.

The Royal Indemnity Company's petition rested upon two contentions. One of mixed law and fact that the bankrupt

> "did not have its principal place of business within the Northern District of Illinois for the greater portion of the six months next preceding" * * *

the bankruptcy petition, for the reason that for three months and ten days prior thereto the bankrupt corporation had been under control of Receivers in an equity case (R. 14).

The other contention was that the Court was without jurisdiction because a stockholders meeting had not been called to authorize the filing of the petition.

The bankrupt answered the petition (R. 235-248) traversing the above petition, insisting that its "principal place

of business" was at all times in the Northern District of Illinois; that it transacted its business in Illinois (R. 240); denying the conclusion of law that a stockholders meeting was requisite to the Court's jurisdiction and averring that

> "93% of the outstanding common capital stock, which alone had voting power, then held by the voting trustees thereof duly authorized the filing of said petition, and further that said petitioner may not complain thereof." (R. 240.)

On February 15, 1932, Petitioners other than Royal Indemnity Company appeared by the same attorneys, intervened under leave of Court and adopted the position of the Royal Indemnity Company (R. 248-253).

Thereupon, pursuant to Federal Equity Rule No. 29 the District Court heard Petitioners' contentions of law as raised by their petitions on April 6, 1932, and held as follows:

> "1. The Court concludes that as a matter of law, the American Bond and Mortgage Company did not because of the appointment of equity receivers on May 22, 1931, cease to do business on that day, and accordingly did not, on that date, cease to have a place of business in the Northern District of Illinois.
>
> 2. The Court concludes that as a matter of law, said (fols. 444 & 445) petitioners claiming to enjoy the status of creditors and no other status, cannot raise the question as to the power or authority of the board of directors of the American Bond & Mortgage Company, a Maine corporation, to authorize the filing of a voluntary bankruptcy proceeding where such a proceeding is filed in a court which otherwise has jurisdiction." (R. 262-3.)

Having so ruled the District Court then ordered the *fact issues for trial* as follows (R. 263):

> "It is further ordered that said petitions of the Royal Indemnity Company and of said intervenors

> and the said answers thereto, proceed to hearing, and that said Royal Indemnity Company and said intervenors close their proof in support of their respective petitions on or before April 21st, 1932, such hearing to be consistent with this order and with the memorandum of opinion filed by this court on March 23, 1932."

But although given opportunity to present evidence upon the controverted issues of fact, Petitioners offered no evidence whatsoever, contenting themselves with moves for delay (R. 264-265).

On May 3, 1932, an order was signed by District Judge John P. Barnes, denying the petition and supplemental petitions of the Royal Indemnity Company and the individual petitioners (R. 265-267) and the following findings made:

1. That said petitioners had failed to introduce any evidence in support of their said petitions.

2. That the time fixed by the order of Court for the closing of proof on part of said petitioners expired April 21, 1932.

3. That the points of law raised by said petitions and the answer of the Bankrupt thereto had been decided adversely to said petitioners.

4. That at the time of the filing of the voluntary petition in bankruptcy by the American Bond & Mortgage Company, a corporation, and at the date of the order of adjudication in bankruptcy entered therein on September 5, 1931, the District Court of the United States, Northern District of Illinois, Eastern Division, had jurisdiction to adjudicate the said American Bond & Mortgage Company, a corporation, and had jurisdiction of its person and property (R. 265-267).

Appeal having been taken by the petitioners from the order of April 6, 1932 (R. 262) and the final order of May 3, 1932 (R. 265), the Circuit Court of Appeals for the Seventh Circuit affirmed the decision of the District Court and in its opinion (61 F. (2d) 875) District Judge Lindley in speaking for the Court said in part:

"The adjudication upon a voluntary petition is ex parte, and creditors are given no right to contest it. They are strangers at the bar and have no voice in the hearing, for the bankruptcy law permits no defense in limine to a voluntary petition. No defense is permitted by any party unless it be by stockholders contesting the asserted power of the directors. See In re Guanacevi Tunnel Co., 201 Fed. 316 (C. C. A. 2nd); In re E. T. Russell Co., 291 Fed. 809 at 818; In re United Grocery Co., 239 Fed. 1016 at 1018; In re Hargadine-McKittrick Dry Goods Co., 239 Fed. 155 at 158."

* * * * * * * * *

"So here the principal place of business of the corporation having been within Chicago and the adjudication having been entered upon the finding that such had been the fact for the greater portion of six months preceding the filing of the petition, the Court had jurisdiction unless there is evidence otherwise. No such proof appears unless it be by way of the facts regarding the receivership.

Inasmuch as the order appointing the receiver did not deprive the corporation of all corporate powers and franchises, it follows that such powers and franchises as it did retain were in operation at the place where its principal place of business had previously been. This corporate business, as Judge Lacombe said, may have been little or none, but if the corporation had any principal place of business at all it was in Chicago."

No motion for rehearing was filed by petitioners in the Circuit Court of Appeals for the Seventh Circuit.

In the proceedings heretofore had in this case the petitioners have constantly and continuously interjected collateral matter not related to or within the issues in this case. In the brief filed by petitioners in this Court, on page 12, they state that "although not directly involved in this appeal," etc., no step has ever been taken in the involuntary proceeding in Illinois except on the hearing of petitioners' motion to dismiss, but they fail

to inform the Court that they sought and obtained a "stay" of all proceedings under General Order No. 6 until determination of the involuntary petition in Maine (R. 8, 17).

Solely for the reason of aiding the Court, we have set out in Appendix A the chronological history of the litigation of the American Bond & Mortgage Company.

The principal questions here presented on review, aside from the question of jurisdiction hereinafter mentioned (p. 8 are clear and simple. First: Did the appointment of Equity Receivers with instructions to carry on the business of the company affect or destroy the principal place of business of the Bankrupt Company; and secondly: Can a general creditor question the adjudication in voluntary bankruptcy proceeding on the theory that the Court was without jurisdiction to enter the order of adjudication because a meeting of stockholders was not called, notwithstanding the fact that the Board of Directors and Voting Trustees holding 93 per cent of the outstanding capital stock duly authorized the filing of the petition.

SUMMARY OF ARGUMENT.

1. As hereinafter set forth in connection with "Jurisdiction", page 8 of the present brief, respondent asserts that the Court below had no jurisdiction on appeal from an order denying a motion to vacate the order of adjudication and hence this Court has no jurisdiction on certiorari.

2. Under authorities cited, the appointment of Equity Receivers to carry on the business of the Bankrupt Company during the greater portion of the six months next preceding the filing of the voluntary petition does not affect or destroy the principal place of business of the Bankrupt Company.

3. It is well settled that creditors are not concerned with and have no standing in court to contest adjudication in a voluntary case where the Board of Directors authorized the filing of the voluntary petition and *a fortiori* when Vot-

ing Trustees holding 93 per cent of the outstanding capital stock of the Bankrupt Company likewise authorized the filing of the petition.

4. Section 63 of Chapter 56 of the Revised Statutes of Maine (1930), titled and captioned "Rights of Minority Stockholders", in providing that a stockholders meeting is necessary before a corporation shall sell, lease or consolidate its entire business, has no reference to the right of the directors of the company to file a voluntary petition in bankruptcy.

ARGUMENT.

Point I.—Jurisdiction.

Respondents feel it their duty to question the jurisdiction of this Court, which petitioners assert rests upon Section 240-A as amended, on the ground that the Court below had no jurisdiction on appeal and hence this Court has no jurisdiction on certiorari.

Two writs of certiorari have been granted by this Court, one bringing up the appeal from the interlocutory order of April 6, 1932 (R. 262), the other the final order of May 3, 1932 (R. 265). Both orders deny the Petition to vacate the order of adjudication of voluntary bankruptcy. The interlocutory order recites that the hearing resulting in this order took place under Equity Rule 29 for the purpose of separately hearing and disposing of the two points of law challenging the jurisdiction put forward by petitioners. The order of April 6, 1932, recites:

> "The Court having considered the said points of law raised by said allegations in said petitions of the Royal Indemnity Company and said intervenors *and in the allegations contained in the said answers thereto filed by said American Bond & Mortgage Company*", (italics ours)

overruled the contentions of petitions on their two points of law and allowed petitioners until April 21, 1932, to close their proof in support of their claims that the order of adjudication was invalid and should be vacated. Peti-

tioners applied for and argued a motion to extend the time given under the order of April 6, 1932, within which to close their proof but this motion was denied (R. 264). This of itself would seem to destroy any right of appeal from this order, as obviously petitioners could not at one and the same time proceed under an order and appeal from it.

Petitioners submitted no further proof within the prescribed period and a default therefore occurred which resulted in the final order of May 3, 1932 (R. 265), holding:

> "(2) That the time fixed by the order of this Court for the closing of proof on the part of said petitioners expired April 21, 1932.
>
> (3) That the points of law raised by said petitions *and the answer of bankrupt* thereto have been decided adversely to said petitioners." (italics ours)

The order then went on to hold that at the time of the filing of the voluntary petition the Court had jurisdiction to adjudicate respondent a bankrupt and denied the petition to vacate the order of adjudication (R. 266, 267).

It thus appears that the interlocutory order of April 6, 1932, was heard upon the *petition* of petitioners *and the answer* of respondents; that on this basis petitioners' objections were overruled and time allowed within which to prove their allegations; that no proof was forthcoming and that *on this ground* a final order dismissing their petition to vacate the order of adjudication was entered.

It is submitted, therefore, that neither order was appealable. The interlocutory order was not appealable for the reason that Section 47 of the Bankruptcy Act limits appeals to matters of law and the interlocutory order was based upon matters of mixed law and fact. The final order of May 3, 1932, is likewise not appealable as its basis is petitioners' default and failure to submit proof of their objections to the jurisdiction. The scope of appellate review under Section 47-B as amended by the Act of May 27, 1926, c. 406, sec. 9, 44 Stat. 664; 11 U. S. C. A. sec. 47, cumulative pocket part 1932, is limited to the power "to superintend and revise in matter of law" and there being no question

of law before this Court (it having merged in one of fact in the trial court when the interlocutory order merged in the final order, it follows that the Court below had no jurisdiction on appeal and this Court has none on certiorari.

In addition it should be remembered that petitioners' appeal below was not from the order of adjudication *but from the order denying petitioners' motion to vacate the order of adjudication* (R. 262, 265, 272). The judgment of adjudication being presumptively correct (Chicago Bank of Commerce v. Carter, 61 F. (2d) 986, 988, and cases cited), the motion to vacate was addressed to the discretion of the Court wherein the Court would be compelled to weigh the strength of the showing in favor of vacating its order already entered as against the presumption in favor of the validity of that order. Petitioners' motion is, therefore, analogous to a motion for a new trial, a motion to reinstate a cause already dismissed, or a motion to set aside a judgment, all of which upon denial give no right of appeal.

Further, it should be remembered that the ground of petitioners' motion was that the principal place of business of the company was not within the jurisdiction of the trial court upon the theory that Equity Receivers having been appointed more than three months prior to the filing of the petition the company ceased to do business on the date of their appointment. However, under the decisions the question of the locus of the principal place of business is always one of *fact*. The claim that the appointment of Equity Receivers destroyed the principal place of business in Illinois *as a matter of law* is a misuse of words. Whether after the appointment of the Equity Receivers the company *could* have a place of business in Illinois was a legal question preliminary to the further inquiry: *Did* the company then have a place of business in Illinois? Ultimately, therefore, the question before the Court was one of fact, in the decision of which petitioners' "question of law" was only one of a number of matters to be weighed in considering whether petitioners' motion overcame the presumption of

correctness of the judgment of adjudication already entered. This is indicated by the fact that the order of April 6, 1932, denying petitioners' contentions of law, ordered petitioners to close their proof on or before April 21, 1932 (R. 262, 263). When petitioners failed to adduce any testimony, the Court, having nothing before it to overcome its previous finding embodied in its order of adjudication, on May 3, 1932, entered a final order denying their motion to vacate (R. 265-267).

The appeal herein does not come within the exception contained in Section 47-B (by reference to Section 48), allowing the appellate court on an appeal *from a judgment of adjudication* to consider both matters of law and of fact.

The other ground of the motion preserved on appeal by petitioners, *i. e.*, that no stockholders meeting was called, seems non-jurisdictional in character, as hereinafter shown, and was no ground for vacating the order of adjudication.

In *Chicago Bank of Commerce v. Carter*, 61 F. (2d) 986, (C. C. A. 8th), the Court held that an order denying a motion to vacate an adjudication was appealable. While agreeing with that Court on other questions decided in its opinion, counsel herein submit, with deference, that the Court's reasoning with respect to the appealability of an order denying a motion to vacate is inconclusive.

POINT II.

A CORPORATION DOES NOT CEASE TO HAVE A PRINCIPAL PLACE OF BUSINESS WITHIN THE MEANING OF THE BANKRUPTCY ACT WHEN IT GOES INTO AN EQUITY RECEIVERSHIP.

Petitioners claim that upon the qualification of the equity receivers and the entry of an order enjoining the corporation from interference with them, the corporation ceased to have its principal place of business in the Northern District of Illinois. This argument assumes (1) that the alleged error is jurisdictional and can be raised by a creditor

after adjudication; (2) that the Bankruptcy Act requires the transaction of business instead of a mere *place* of business; (3) that the business transacted by the equity receivers in preserving the property and carrying on the corporation's work was not the business of the corporation but the business of the Court, the Judge, or the receivers.

As to these contentions, it should be remembered that the principal place of business involves a question of fact. Facts must be alleged and proved and a determination made upon them. Such determination in the form of the adjudication can not be attacked collaterally.

> *Noble v. Union River Logging Co.*, 147 U. S. 165, 173-4.
>
> *Roszell Bros. v. Continental Coal Corp.*, 235 Fed. 343, 345-346, affd. 242 Fed. 243.

This Court has held that an adjudication can not be attacked collaterally on the ground that the principal place of business was not in the district of adjudication.

> *Fairbanks Steam Shovel Co. v. Wills*, 240 U. S. 642, 649.

See also,

> *Cajiafas v. U. S.*, 38 F. (2d) 3, 4. (C. C. A. 6.)

As the Court said in *Roszell Bros. v. Continental Coal Corp.*, above cited:

> "Clearly it has no relation to the court's jurisdiction of the subject matter of the proceeding. That court had jurisdiction of a proceeding in bankruptcy, and such was the character of the proceeding. * * * It is simply a preliminary fact necessary to be alleged and proved to authorize the court to act."

The petition here having alleged that the principal place of business was within the jurisdiction of the Court, and the adjudication having so found it, the burden was upon

petitioners to prove facts inconsistent with respondent's claim. The only thing pointed to by petitioners is the contention put forward as a matter of law that the appointment of the Equity Receivers entirely destroyed the principal place of business of respondent.

As to the allegation of the principal place of business and the burden of proof upon one attacking it see:

In re Guanacevi Tunnel Co., 201 Fed. 316 (C. C. A. 2).
In re Lone Star Ship Bldg. Co., 6 F. (2d) 192, 195 (C. C. A. 2).
In re Biermeister Bros. Co., 208 Fed. 945, 948-9 (D. C.).
Lawrence v. Atl. P. & P. Corp., 298 Fed. 246, 248 (C. C. A. 5).

There is nothing in the Bankruptcy Act to indicate that the transaction of business is necessary to the *existence* of a principal place of business.

This question was squarely presented and decided in *In re American and British Mfg. Corp.*, 300 Fed. 839-846, wherein the Court held that the fact that receivers had been appointed and a corporation's assets sold and converted into cash did not result in the corporation losing the locus of its principal place of business. The Court said:

> "To hold as the petitioner claims would be to rule that, once a receiver is appointed, the business then loses its character, and not only is operated under Court direction but that a debtor could not receive the benefits of the Bankruptcy Act, at least while the receivers were in charge." (R. 864.)

The common sense intention of Congress in using the words "principal place of business" was obviously to allow the petition to be filed where the principal assets of the company were located and naturally this would be in the district wherein the corporation had been carrying on its business prior to the Equity Receivership and wherein the

Equity Receivers continued to carry it on after their appointment.

To the same effect as *In re American & British Mfg. Corp., supra,* are

In re Guanacevi Tunnel Co., 201 Fed. 316.
In re Tiffany v. La Plume Condensed Milk Co., 141 Fed. 444.
In re C. Moench & Sons Co., 130 Fed. 685.
In re E. & G. Theatre Co., 223 Fed. 657.

In the most recent case decided in the United States Courts, in which an attempt to set aside an order of adjudication upon a voluntary petition was made, raising exactly the same points as raised in this case, Mr. Justice Gardner speaking for the Circuit Court of Appeals for the Eighth Circuit said (Chicago Bank of Commerce v. Carter, 61 F. (2d) 986, at page 987):

> "The jurisdiction of the bankruptcy court must depend upon the existence as a fact of the residence, domicile, or principal place of business of the person to be adjudged bankrupt within the district of the court for the period of time required by statute. In considering the question of the court's jurisdiction, we may exclude any question of domicile or residence of these corporations because, confessedly, neither of them had a domicile or residence in the state of Arkansas, all being as to that state foreign corporations. If the court's jurisdiction is to be sustained, it must be upon the ground that these corporations had their principal places of business in the state of Arkansas for six months, or the greater portion thereof, immediately preceding the filing of the petitions.
>
> It was alleged in the petitions to vacate the order of adjudication that they had not had such principal places of business within the territorial jurisdiction of the bankruptcy court. The appellees joined issue on this allegation, and the trial court, after hearing the testimony, found as to the Central Texas Ice Company as follows: 'Testimony of witnesses was taken orally

at the bar of the court and the cause was argued and the court having heard and fully considered all of said facts and pleas, and arguments, and being fully advised in the premises is of the opinion that the principal place of business of said Central Texas Ice Company was within the jurisdiction of this court for a period of six months immediately preceding the date of its said adjudication, and being of the opinion that the application and amended application should be overruled and dismissed.'

A substantially identical finding was entered as to each corporation.

Every presumption is indulged in favor of the jurisdiction of the court once assumed, and there is, of course, a presumption in favor of the correctness of the finding of the lower court. As said by this court in Central Republic Bank & Trust Co. v. Caldwell, et al., 58 F. (2d) 721, 734: 'The rule in this court often announced is: "Where the court below has considered a question and made a finding on conflicting evidence, its conclusion is presumptively correct, and it should not be disturbed unless it is reasonably clear that a serious mistake has been made in the consideration of the facts or an obvious error has intervened in the application of the law." Dodge v. Norlin (C. C. A.) 133 F. 363, 371; Cleage v. Laidley, 149 F. 346, 353 (C. C. A. 8); Houchin Sales Co. v. Angert, 11 F. (2d) 115, 117 (C. C. A. 8), and cases cited; Parrish v. City Nat. Bank, 32 F. (2d) 982 (C. C. A. 8); Remington on Bankruptcy (3d Ed.) sec. 3871; see Quinn v. Union Nat. Bank, 32 F. (2d) 762 (C. C. A. 8).'

To the same effect see Coder v. Arts (C. C. A.), 152 F. 943, 15 L. R. A. (N. S.), 372, affirmed 213 U. S. 223, 29 S. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Moore v. Yampa Mercantile Co. (C. C. A.), 287 F. 629; In re Cannon (C. C. A.), 31 F. (2d) 388.

The question as to the place of business of a corporation is one of fact. Home Powder Co. v. Geis (C. C. A.), 204 F. 568, 572; In re Pusey & Jones Co. (C. C. A.), 286 F. 88; Continental Coal Corp. v. Roszelle Bros. (C. C. A.), 242 F. 243; Dryden v. Ranger Refining & Pipe Line Co. (C. C. A.), 280 F. 257, 262; In re Pennsylvania Consol. Coal Co. (D. C.) 163 F. 579.

This court in Home Powder Co. v. Geis, supra, referring to the place of business of a corporation, said: 'It thus becomes a question of fact as to whether the mining company had its principal place of business in the Western district of Missouri for the greater portion of the six months next preceding August 27, 1910.'

In Dryden v. Ranger Refining & Pipe Line Co., supra, the court said: 'Where a corporation conducts its business at a number of places, no one of which is plainly the place where its business is principally conducted, one of such places, where a substantial business is transacted, and from which general supervision of all of its business is exercised, may be properly held to be the principal place of business of such corporation.'

In the course of the opinion in the above case, the court quoted with approval from In re Worcester Footwear Co. (D. C.), 251 F. 760, 761, as follows: 'It is not easy, nor is it required, to lay down any general rule for determining which one of several places at which a corporation does business is its principal place of business.'

The principal place of business of a corporation is to be determined by the facts, and not by the intentions of the parties, nor the recitals in the charter of the corporation. The principal place of business of a corporation for the purpose of jurisdiction in bankruptcy being a question of fact, neither its place of incorporation nor its charter is controlling. In re Pennsylvania Consol. Coal Co., supra."

The principal cases cited by petitioners were:

In re Perry Aldrich Co., 165 Fed. 249 (D. C. Mass.).
In re McNally Co., 208 Fed. 291.

In the *Perry Aldrich* case the corporation had no place of business in Massachusetts for more than four months except a room occupied, used and paid for by another concern. The receivership was in another state, and the receivers had no authority to carry on the business of the corporation nor did they ever undertake to carry it on. These facts seem to afford a sufficient ground for decision

to differentiate this case from the present. It is noticeable, too, that the *Perry Aldrich* case was cited but not followed in two subsequent cases, *In re Monarch Oil Co.*, 272 Fed. 524, and *In re E. & G. Theatre Co.*, 223 Fed. 657, both of which latter cases were cited and reviewed in *In re American & British Mfg. Corp., supra.*

In *In re McNally Co.*, 208 Fed. 291 (D. C. S. D. N. Y.), cited by petitioners, the Court found that a Pennsylvania corporation which had filed a certificate changing its address to New York, to carry on the business of which receivers were appointed in 1909, subsequent to which date it had then no business in New York, did not have its principle place of business in New York, for the purpose of a petition in bankruptcy filed in 1912. A reading of the opinion shows that the finding of fact by the Court relative to its cessation of doing business in New York was the basis of the decision.

In re Plotke, 104 Fed. 964, did not involve a corporation at all and was an involuntary case.

The argument of petitioners that when Equity Receivers are appointed the business passes out of the hands of the bankrupt so that there no longer exists "his principal place of business" seems over-ingenuous and would result in the destruction of the corporate entity. The true view would seem to be that the corporation carries on its business through the medium of receivers. Thus, suppose the corporation becomes solvent and the receivers are discharged. Does a *new* business come into existence? If not the old business must have continued through the instrumentality of the receivers. Only in this way can the facilities afforded by the Bankruptcy Act for the liquidation of assets where they principally exist be utilized. The argument would result, too, in the case of a true foreign corporation, which had gone into an Equity Receivership, that no bankruptcy petition at all could be filed in this country.

By the appointment of Equity Receivers the legal existence of a corporation is not cut short. The existence of such corporation is not suspended. It is still the corporate entity that it was before. It is clothed with the same franchises and its corporate powers continue to exist subject in their exercise, of course, to the order of the Court appointing the Receivers. Under such circumstances the corporation can and may generally do all things necessary to preserve its legal existence notwithstanding the appointment of the Receiver to which the temporary management of the corporation property is given. Otherwise, the appointment of a Receiver would be tantamount to a dissolution of the corporation.

Petitioners' restriction of the word "business" in Sec. 2 (1) of the Bankruptcy Act to "active and personal engagement in a commercial pursuit" has no foundation in the Act itself. A corporation is none the less carrying on business within the meaning of the Act when, for the protection of itself and its creditors, it utilizes the processes of United States Courts. Equity receivers are appointed not to destroy but to preserve a business. This Court can take judicial notice that there is a constant close contact between receivers of a corporation and the corporation itself and its officers in the ordinary Equity Receivership. Not all Equity Receiverships lead to bankruptcy; the corporation has the power at all times upon a proper showing to move for the discharge of the receivers; in many cases it does so and this activity, coupled with its continuation as a corporate entity and its utilization of the processes of the Courts is a sufficient doing of "business" within the meaning of the Bankruptcy Act.

As to petitioners' contention that the activities of the Equity Receivers are their own or the Court's but not the company's, this Court has squarely held in *Michigan v. Michigan Trust Co., Receivers*, 286 U. S. 334, 76 Law. Ed. 684, that an Equity Receiver continuing the operation of the

corporate business is using the company's corporate franchise and that through the Court that receiver acts as the company. To the same effect is

Central Trust Co. v. N. Y. C. & N. R. Co., 110 N. Y. 250, 18 N. E. 92.
N. Y. Terminal R. R. Co. v. Gaus, 204 N. Y. 512, 98 N. E. 11.
Armstrong v. Emmerson, 300 Ill. 54, 62.
People v. Hopkins, 18 F. (2d) 731, 733.
In re Detroit Properties Corp., 254 Mich. 523, 236 N. W. 850.

There being no allegation in petitioners' motion to vacate to the effect that the Equity Receivership did not, between May 22, 1931, and September 5, 1931, transact any business of the corporation as the order of May 22, 1931, authorized and directed them to do ~~(R. 94-96)~~ it must be presumed that they did transact business and this is the fact.

United States v. Whitridge, 231 U. S. 141, 148, cited by petitioners, is not in conflict, the only question involved being whether an excise tax for the doing of business in a purely corporate capacity applied to a corporation in receivership. Likewise, *Price v. United States*, 269 U. S. 492, 502, and *United States v. Butterworth*, 269 U. S. 504, cited by petitioners, seem inapplicable, the question involved in those cases being the priority of debts due the United States within the meaning of R. S. Sec. 3466. These two cases were companion cases to *Bramwell v. United States Fidelity Co.*, 269 U. S. 483, wherein Mr. Justice Butler remarked:

> "It is a rule of universal application that general expression used in a court's opinion are to be taken in connection with the case under consideration."

The expressions in the *Price* and *Butterworth* cases are to be taken in connection with the question as to the priority of debts due the United States.

POINT III.

THE POWER OF THE BOARD OF DIRECTORS TO FILE A VOLUNTARY PETITION CAN NOT BE QUESTIONED BY A CREDITOR SINCE NO JURISDICTIONAL QUESTION IS INVOLVED.

It should be remembered that the action of the Board of Directors in the present case was duly authorized by Voting Trustees holding 93 per cent of the stockholders (R. 239-240). Petitioners, however, contend that a formal stockholders' meeting should have been called. The District Court held that however the Maine law was construed, if the Board of Directors should authorize the filing of a voluntary bankruptcy proceeding "and such proceeding is filed in a court which otherwise has jurisdiction, it is exceedingly difficult to see what concern it is of a creditor whether that proceeding has been formally authorized by stockholders" (R. 261).

The Circuit Court of Appeals in approving the action of the District Court said:

> "The adjudication upon a voluntary petition is ex parte, and creditors are given no right to contest it. They are strangers at the bar and have no right in the hearing, for the Bankruptcy Law permits no defense in limine to a voluntary petition" (R. 284).

If this be the law it is obvious that only a *jurisdictional defect* can be brought to the attention of the Bankruptcy Court by a creditor. It seems clear that the alleged absence of the authorization of the stockholders is not a jurisdictional defect. Certainly the Court had jurisdiction of the *subject matter*. The petitioners' claim, therefore, narrows itself down to the assertion that the Court did not have jurisdiction of the *person*.

It is difficult to see how the action of the Corporation in submitting its case to the Court, having its attorneys appear on its behalf and invoking the exercise of the Court's

powers did not give the Court jurisdiction of the *person.* Certainly a judgment in such a case would bind a corporation personally.

Leman v. Kreutler Arnold Co., 284 U. S. 448, 451, which is conclusive.
15 C. J. 798.
1 Freeman on Judgments, 5th ed. p. 684.
Schroeder v. Merchants & Mechanics Ins. Co., 104 Ill. 71, 75.
U. P. R. Co. v. U. S., 2 Wyo. 170, writ of error dismissed, 105 U. S. 262.

As an indication that the alleged error was not jurisdictional in a true sense is the fact that where a petition is filed without a stockholders' authorization the defect later on may be waived by delay or acquiescence of a stockholder.

In re Farmers Supply Co., ~~255~~ 273 Fed. 824, 826 (C. C. A. 5).
Dodge v. Kenwood Ice Co., 204 Fed. 577, 579 (C. C. A. 8).

If the action of the corporation were utterly void obviously no waiver could render it valid.

The authorities are conclusive that creditors can not raise the question of the alleged defect.

In re A. C. Wagy & Co., Inc., 22 F. (2d) 9 (C. C. A. 9).
In re Guanacevi Tunnel Co., 201 Fed. 316-318 (C. C. A. 2).
In re Ann Arbor Machine Corp., 274 Fed. 24, 28-29 (C. C. A. 6).
In re United Grocery Co., 239 Fed. 1016, 1018 (D. C. Fla.).
In re E. T. Russell Co., 291 Fed. 809, 818 (D. C. Mass.).
In re Pneumatic Steam Splicer Co., 60 F. (2d) 524, 525 (D. C. Md.)

In the case of *Chicago Bank of Commerce, supra,* Mr. Justice Gardner, speaking for the Circuit Court of Appeals, 8th Circuit, said:

> "At the threshold of this controversy, we are met with the objection that the appellants, being creditors, could not maintain petitions to vacate the adjudication in bankruptcy on a voluntary petition. As a general rule, a general creditor has no such standing in a bankruptcy court as to entitle him to move to vacate an adjudication made in a voluntary proceeding. In re A. C. Wagy & Co. (C. C. A.), 22 F. (2d) 9, 11; In re Ann Arbor Mach. Corp. (C. C. A.), 274 F. 24; In re Ives (C. C. A.), 113 F. 911."
>
> "The appellants, as creditors, were not concerned with the regularity of the proceedings of the board of directors. A majority of the board of directors of each company was in attendance when the action was taken authorizing the filing of petitions in voluntary bankruptcy. A majority of the board had authority to pass such a resolution, binding upon the whole board and upon the corporation.
>
> In In re Guanacevi Tunnel Co., *supra,* a creditor contended that an adjudication in bankruptcy was filed without authority. In the course of the opinion the court said: 'The petitioner contends that the voluntary petition was filed without authority, because he alleges that the corporation is solvent (in the sense of the Bankrupt Law), and because only the majority of shareholders can, by the laws of Arizona, dissolve a corporation prior to the time fixed in the articles of incorporation. We will examine this contention, although we think it is one which a creditor has no standing to make in the case of a voluntary petition. * * * The voluntary petition for adjudication as bankrupt is tantamount to such proceedings. The petition charges that the corporation is unable to meet its current obligations, which is commercial insolvency. The Bankruptcy Act itself permits any person who owes debts to file a petition to be adjudicated. "Any qualified person may file a petition to be adjudged a voluntary bankrupt." Section 59a.'

> Neither the nonparticipating directors, nor any one purporting to represent the corporations, or either of them, objected to the action of the directors, and the irregularity was not such as could be taken advantage of by the appellants as creditors. At the time the action was taken, substantially all the stock of all the corporations was represented in the person of the directors present and participating, and we conclude that the bankruptcy court acquired jurisdiction to enter orders of adjudication."

As shown in Point 4 p. 24 hereof, a final indication that the error is not jurisdictional is the fact that the Maine statute applies only to the *transfer* of the corporation's assets and this is effected not by filing the petition but by the adjudication. Filing the petition is in no way forbidden by the Maine statute. See the statute verbatim Appendix C herein. See also

In re Kenwood Ice Co., 189 Fed. 525, 528, Affd. 204 Fed. 577 (C. C. A. 8).
In re DeCamp Glass Casket Co., 272 Fed. 558, 565 (C. C. A. 6), *cert. den.* 256 U. S. 703.
Fitts v. Custer Slide Min. & Devel. Co., 266 Fed. 864, 868 (C. C. A. 8).

The right to go into bankruptcy being absolute, at the option of the bankrupt, the remark of a leading text writer that only an objection *going to the jurisdiction* can be raised by creditors seems absolutely sound.

1 Remington on Bankruptcy, Sec. 512½, 1931 supplement.
In re A. C. Wagy & Co. Inc., supra.

The answer of petitioners to the cases above cited is the claim that so far as Maine is concerned the matter is disposed of by the decision of the Maine Court in *Rollins v. Clay*, 33 Me. 132, the suit in trepass referred to in the present brief. It is asserted that this case announces the public policy of the State which is alleged to be controlling. It

seems to respondent that the question at issue being what is a jurisdictional defect under the Bankruptcy Act the policy of the State of Maine relative to defects in land titles or otherwise is not germane to the discussion of a matter of purely Federal law.

Commerce Trust Co. v. Chandler, 295 Fed. 241, cited by petitioners involved an equity proceeding, not bankruptcy. The case simply held that a creditor had the right to contest claims against an insolvent estate.

Westerlund v. Black Bear Min. Co., 203 Fed. 599 (C. C. A. 8), cited by petitioners is in favor of respondent in holding that only stockholders could complain of non-compliance with a statute prohibiting an incumbrance without the approving vote of the stockholders.

POINT FOUR.

CHAP. 56, SEC. 63, REV. STAT. OF MAINE 1930, DOES NOT REQUIRE A STOCKHOLDERS' MEETING PRIOR TO VOLUNTARY BANKRUPTCY.

It is stoutly maintained in Petitioners' brief that in spite of the agreement of Voting Trustees holding 93 per cent of Respondent's outstanding common voting stock (R. 239-240), the failure of the company to wait until an annual stockholders' meeting before filing the voluntary petition or to call a special meeting for this purpose, renders the filing of the voluntary petition null and void and compels the bankruptcy court to vacate its adjudication of Respondent as a bankrupt.

This somewhat extraordinary conclusion is claimed to follow from a Maine statute quoted below (Petitioners omit the Title and Caption; see statute fully quoted Appendix C.):

> "RIGHTS OF MINORITY STOCKHOLDERS. Sec. 63. Corporation Not to Sell Franchise or Entire Property without Consent of Stockholders. R. S. c. 51, sec. 60, 1929, c. 242."

"Corporation not to sell franchises or entire property without consent of stockholders, R. S., c. 51, s. 60, 1929, c. 242. No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation. All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined. Except as to franchises, this and the eleven following sections shall not be held to apply to mortgages or corporate property."

The plain purpose of the Statute, as the Title & Caption indicates, is the protection of minority stockholders in case of "sale, lease or consolidation" of a corporation's entire property. As minority stockholders have a substantial protection in the fact that a solvent corporation infrequently or never goes into voluntary bankruptcy, it is difficult to believe that the Maine legislature in 1891, twenty years before corporations had the right to file voluntary bankruptcy proceedings (the right was first conferred by the Bankruptcy Act of 1910; See *In re Jefferson Casket Co.*, 182 F. 689 (D. C. N. Y. 1910), intended, under a statute headed "Rights of Minority Stockholders" to require an annual meeting, or a special meeting, of the stockholders as a pre-requisite to taking the emergency step of voluntary bankruptcy. So fantastic does the idea appear that only the clearest words should be construed to convey such a meaning.

The clear words are not in the Statute. A voluntary petition in bankruptcy is not "selling" or "leasing" or "consolidating" a corporation's franchise or its entire property. The only words in the Statute remotely appli-

cable to a voluntary petition in bankruptcy is the statement that "No corporation * * * shall in any manner *part with* its franchise or its entire property." Petitioners claim that a voluntary petition in bankruptcy constitutes "parting with" the company's property in violation of the Act.

It is sufficient answer to state that it is not the *filing* of the Petition which could constitute in any case "parting with" the property in a voluntary bankruptcy but the *adjudication.* The adjudication is the act of the Court, not of the company. In terms therefore the Statute does not prohibit the company from filing the Petition. It will no doubt be conceded that the Statute does not prohibit a *Federal Court* from achieving, by an adjudication of bankruptcy, the conveyance of a corporation's property. Nor does the statute denounce an "attempt", assuming that filing the Petition is an "attempt" to part with property.

As above stated, filing a voluntary petition is not selling or leasing or consolidating. These words throw light on the phrase "part with." It is noticeable that the phrase "part with" is not repeated at the end of the paragraph wherein, after the requirement for a stockholders' meeting, the statute provides that the call for the meeting "shall give notice of the proposed *sale, lease or consolidation.*" There is no reference here to "parting with" the company's property, which indicates that the dominant thought in the legislative mind was protection of minority stockholders in case of a "sale, lease or consolidation."

Any possible contention that Section 63 applies to voluntary bankruptcy seems removed by the provisions of the second sentence to the effect that:

> "All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined."

This sentence restricts the first sentence in Section 63 to "sales, leases and consolidations", none of which include

voluntary bankruptcy. It makes nonsense to contend that a voluntary bankruptcy is subject to the provisions of Section 63 and the eleven following sections of the Act. (See entire statute Appendix C.) Obviously, there is no such thing as a "prior lien of stockholders" when a company is bankrupt.

No authorities need be cited to the effect that state statutes should not be construed to invade the field of Federal law. From the viewpoint of convenience there seems no reason why a state legislature should consider that a stockholders meeting, annual or special, should be necessary before a corporation chartered by it could go into bankruptcy. On the contrary, every reason flowing from convenience, protection of the stockholders as well as the creditors, points to the necessity on many occasions for a corporation to go into bankruptcy overnight in order that its assets may not be dissipated and to protect its creditors to the limit. Indeed, it may be questioned whether a state statute so construed as to hamper a corporation in taking advantage of the Federal Bankruptcy Act would be constitutional. This Court can take judicial notice of the fact that corporations operate frequently in states far distant from the state of their creation and that their stockholders in many cases run into the thousands. Construing the Maine statute as contended for by petitioners hamstrings the right of a corporation speedily and conveniently to take advantage of the Federal Bankruptcy Act in that it requires a corporation to leave its principal place of business, many times far distant from the state of its charter, go to the state of its charter, call a meeting of the stockholders in that state and then return to its principal place of business in order to file its petition in bankruptcy. Whatever the technical rights conferred as to the *place* wherein a corporation may enter bankruptcy, it was certainly the plain intention of the Bankruptcy Act that the usual place for a voluntary petition in bankruptcy should be the principal place of business of the corporation.

Turning to the decisions cited by petitioners in support of their contention that the Maine statute includes voluntary petitions in bankruptcy, respondents herein find none of the cases so cited on pages 16-18 of petitioners' brief in point.

The first case cited, *In re Standard Shipyard Co.*, 262 Fed. 522 (D. C. Maine), involved an *involuntary* proceeding, the question at issue being whether a letter written by the clerk of a corporation by authority of its directors *prior to the filing of involuntary petition* stating the inability of the corporation to pay its debts and suggesting involuntary proceedings in bankruptcy was such an unqualified admission as to constitute an act of bankruptcy. It seems clear that this question has nothing whatever to do with the present case. A reading of the decision shows that the basis of the decision was the ordinary rule of law that deputizing in advance an officer of a corporation to admit bankruptcy *provided a petition should be filed* is not an act of bankruptcy.

Having so held, the Court then in effect states not only it was not an act of bankruptcy but if it were an act of bankruptcy under the Maine statute a meeting of the stockholders would be necessary. It should be observed that this latter holding is (1) dictum, the case having already been decided on another ground; (2) it was a decision of a *Federal District Court* (not a decision of the highest court of the state), handed down January 8, 1920, prior to the enactment of the amendment to Section 63, Chapter 56, in 1929. Further, the basis of the decision is by a parity of reasoning drawn from *In Re Bates Machine Co.*, 91 Fed. 625, wherein a Massachusetts statute enacted prior to 1899, in no way similar to the present Maine statute, was construed by a Federal Court. As the Massachusetts statute was enacted long prior to the Bankruptcy Act of 1910, permitting for the first time a corporation to file a voluntary petition it seems to evidence no application to the present question.

Further ground of distinction in the *Standard Shipyard Case, supra,* is the fact that the alleged lack of proof of an act of bankruptcy and the other questions in the case were raised not by creditors but by the Court itself, which dismissed the petition.

In Re Bates Machine Co., 91 Fed. 625 (D. C. Maine) decided January 28, 1899, was a decision made prior to the Bankruptcy Act of 1910, and the present question was not before the Court.

In *Re Quartz Gold Mining Co.,* 157 Fed. 243 (D. C. Ore. 1907) is likewise a decision rendered prior to the amendment of the Bankruptcy Act in 1910. The case simply holds that under an Oregon statute restricting the right to dissolve a corporation to the stockholders a corporation cannot commit an act of bankruptcy by resolution of its directors admitting its inability to pay and its willingness to be adjudged a bankrupt. The question of the lack of the power in the directors was not raised by a creditor and this point was not before the Court.

Van Emon v. Veal, 158 Fed. 1022 (C. C. A. 9th Circuit, 1908) is simply a memorandum opinion affirming without reasons the case above cited.

In Re Burbank Co., 168 Fed. 719 (D. C. N. H. 1909) was prior to the amendment of the Bankruptcy Act of 1910 and simply follows without opinion *In Re Bates Machine Co., supra, In Re Quartz Gold Mining Co., supra,* and *Van Emon v. Veal, supra.*

In Re Crystal Ice Co., 283 Fed. 1007 (D. C. Mont. 1922) was likewise an involuntary proceeding wherein the chief question involved was whether an act of bankruptcy had in effect been committed. After holding that it had not been committed, the Court went on by way of dictum to say it could not have been committed.

In Re Security Association, 52 F. (2d) 961 (D. C. Nev. 1931) was likewise an involuntary proceeding wherein the alleged bankrupt itself made a motion to dismiss on the

ground, among other grounds, that the approval of the stockholders was necessary to the action of the directors. A creditor raised the point and the case simply followed the cases last referred to.

The case of *Rollins v. Clay*, 33 Maine 132, cited in the brief of petitioners on page 17, was decided in 1851. The statute in question first appeared in the jurisdiction in Maine as Chapter 84 of the Public Laws 1891, and the statement that this decision was rendered in favor of one who was not a stockholder, establishing as the law of Maine corporation that the right to raise this objection was not confined to stockholders, is not applicable to the point involved. Actually the case of *Rollins v. Clay* was an action of trespass, *quare clausum*, and the question of common law power of directors to alienate land arose in connection with the question of title to the property. That case is no authority whatever for the legal proposition that creditors of a corporation can attack what purports to be corporate conveyance merely on the grounds that some minority stockholder or stockholders were not consulted.

An analysis of the above cases cited by petitioners in favor of their construction of the Maine statute shows no construction whatever by the highest court of the State of Maine or by any Maine court at all. The only actual construction of the Maine statute was in *In Re Standard Shipyard Co., supra*, the decision in an *involuntary* case being by a United States District Court. There is nothing in the decision to the effect that the Maine statute deprived directors of their right to file a voluntary petition in bankruptcy on behalf of the corporation. The statement by counsel for petitioners that the *Standard Shipyard Co. Case, supra*, was to this effect is entirely erroneous. The further statement,

> "That such is the law of Maine has not been disputed either by the District Court or by the Circuit Court of Appeals in this case"

is likewise erroneous. Respondent's view of the Maine statute was briefed and argued in both the District Court and the Circuit Court of Appeals. This is shown by the opinion of the District Court (R. 261). While not considered by the Circuit Court of Appeals in its opinion the point was raised before that court in respondent's briefs.

It is submitted that there being no authoritative interpretation of the Maine statute by the highest court of the State and the subject matter of the statute being in the general field of the Federal law as involving the right of a corporation to take advantage of the Federal Bankruptcy Act with respect to voluntary proceedings in bankruptcy, it is open to this Court to construe the Maine statute as this Court sees fit. The decision of the District Court in *In Re Standard Shipyard Co., supra,* is not binding upon this Court. The orderly administration of the Bankruptcy Act, the rule in favor of its liberal construction in order that the Act may be utilized to its fullest possible extent, the evident intention of the Act that it may be resorted to by corporations as well as individuals upon short notice, lead to the belief that no state statute should be interpreted to obstruct these several aims unless absolutely necessary. Certainly in the present case the Maine statute does not in so many words apply to bankruptcy; as already outlined, it is only by strenuous "interpretation" that it can be made to include voluntary bankruptcy. At the time of its enactment there was no such thing as the voluntary bankruptcy of a corporation, the right to which was only conferred by the amendments to the Bankruptcy Act of 1910. The caption of the Maine Act, its general scope revealed by reading Sections 63-74, all having to do with consolidation, merger, stock values, etc., shows that the Act was intended only to protect minority stockholders in the particular situations expressly covered.

It is a well settled principle that directors of a corporation have the power to place the corporation in bank-

ruptcy by voluntary petition without submitting the matter to a vote of the stockholders even though the state statute requires a stockholders meeting for purposes of dissolution.

In re Lone Star Shipbuilding Co., 6 F. (2d) 192.
In re United Grocery Co. (D. C.), 239 Fed. 1016.
In re E. T. Russell Co. (D. C.), 291 Fed. 809.
Chicago Bank of Commerce v. Carter, 61 Fed. (2d) 986 and cases cited.

In the case of *In re Pneumatic Tube Steam Splicer Co.* (D. C.), 60 F. (2d) 524, wherein the petitioners moved to set aside the order of adjudication on grounds similar as urged in this case, District Judge Coleman said:

> "It is a well settled principle that a creditor may not challenge the right of a corporation's board of directors to file a petition in bankruptcy on behalf of the company."

The Court further held that a state statute requiring consent of two-thirds of stockholders to dissolution of a corporation does not affect the directors' right to place corporation in bankruptcy by their vote alone.

The filing of a petition in bankruptcy by a corporation was held not an "incumbrance" of its property, within the meaning of Rev. St. Colo. 1908, sec. 865, as amended by Laws Colo. 1915, p. 175, providing that the directors of a mining corporation shall not have power to incumber its mines or plant without a vote of the stockholders authorizing it. *Fitts v. Custer Slide Mining & Development Co.* (C. C. A. Colo. 1920), 266 F. 864.

Corporation laws of Delaware, providing that the business of every corporation shall be managed by a board of directors, and, forbidding the directors to dissolve a corporation, except with the consent of two-thirds of the stockholders, do not restrict the authority of the directors to authorize the filing of a petition in voluntary bankruptcy on behalf of the corporation, since a corporation is

not dissolved by bankruptcy proceedings, unless the state statute so provides. *In re DeCamp Glass Casket Co.* (C. C. A. Tenn. 1921), 272 F. 558; certiorari denied *Hamilton v. DeCamp Glass Casket Co.* (1921), 256 U. S. 703, 41 S. Ct. 624, 65 L. Ed. 1179.

Petitioners' contentions that the Maine statute required a meeting of the stockholders prior to the filing of the voluntary petition, and most of the cases cited by petitioners in support thereof, were brought to the attention of the United States District Court for Maine in another branch of the present litigation, *In re American Bond & Mortgage Co.*, 58 F. (2d) 379. The Court declined to hold that the Maine statute required the meeting of the stockholders and with reference to the principal place of business stated:

> "It can hardly be doubted in this case that the bankrupt had its principal place of business in Chicago for six months or more prior to the filing of the involuntary petition there (page 382)."

CONCLUSION.

Respondent believes the Court below had no jurisdiction on appeal and this Court has none on certiorari. If the Court believes otherwise it seems clear upon reason and the authorities:

(1) That the principal place of this business was in Illinois and that it was not destroyed by the appointment of Equity Receivers.

(2) That the Bankruptcy Act was intended to cover exactly such a situation as is involved in the present case and to permit through the medium of a voluntary petition and adjudication the liquidation of assets where they are principally located.

3. The failure to call a stockholders meeting was not a jurisdictional defect capable of being urged by a creditor, particularly when the directors duly authorized the filing of the voluntary petition and voting trustees holding 93 per

cent of the outstanding capital stock agreed that the petition should be filed.

4. The Maine statute cited relative to the necessity of a stockholders meeting was not intended and does not cover the filing of a voluntary petition in bankruptcy by the corporation.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX A.

Chronological Statement of American Bond & Mortgage Company Corporate Litigation.

On May 21, 1931, a bill was filed for the appointment of Receivers in Equity for American Bond & Mortgage Company in the United States District Court, Northern District of Illinois, Eastern Division (Rec. 35). The bill alleged solvency but present distress (Rec. 38).

According to the Clerk's file mark an involuntary petition in bankruptcy was filed in the same court at the same time (Rec. 217).

The next day the company appeared in the Equity suit, consented to the appointment of Receivers, and Receivers were thereupon appointed (Rec. 47-51).

The Company answered the involuntary petition denying insolvency or acts of bankruptcy (Rec. 206).

Four (4) days later (May 25, 1931) present counsel for Royal Indemnity Company et al. filed an involuntary petition in bankruptcy against the company in the United States District Court, District of Maine. The company filed its answer in that court, denying insolvency and acts of bankruptcy (Rec. 130) and motion was made by the company to transfer the cause to the United States District Court, Northern District of Illinois, Eastern Division (Rec. 132). This motion was opposed (Rec. 135-161).

Thereupon counsel for Royal Indemnity Company et al. appeared in the United States District Court, Northern District of Illinois and moved:

First: To dismiss the involuntary petition in bankruptcy for alleged defects therein.

Second: To stay all proceedings therein under General Order No. 6 until determination of the involuntary petition in Maine (Rec. 8, also 17).

The Illinois District Court denied the motion to dismiss the involuntary petition but allowed appellants' motion to

"stay" all proceedings until the hearing in the Maine District Court (Rec. 17).

On September 5, 1931, American Bond and Mortgage Company withdrew its answers to the involuntary petitions in Illinois and Maine (thus ceasing to contest adjudication) and also filed its voluntary petition in the Illinois District Court (which is the case now under review here) and upon which adjudication was then had.

On September 10, 1931, Appellants petitioned the Illinois District Court to vacate the order of adjudication upon the voluntary petition and "stay" all proceedings awaiting action in Maine under General Order No. 6.

On April 6, 1932, pursuant to Equity Rule 29 the District Court heard petitioners' contentions of law as raised by their petitions and held that the principal place of business of the bankrupt company was in the Northern District of Illinois for the greater part of six months next preceding the filing of the petition; and secondly, that the petitioners being creditors could not raise the question as to the power or the authority of the Board of Directors to authorize the filing of a voluntary bankruptcy proceeding where a proceeding is filed in a court which otherwise has jurisdiction (R. 262, 263). The Court further ordered that said petitions of said interveners and the said answers thereto proceed to hearing and that said proof in support of their respective petitions be presented on or before April 21, 1932.

The petitioners defaulted and offered no evidence whatsoever and on May 3, 1932, an order was signed by District Judge Barnes denying the petition and supplemental petitions of the Royal Indemnity Company and the individual petitioners (R. 265, 267) and made the following finding: That the petitioners failed to introduce any evidence; that the points of law raised by the petitions and the answer of the bankrupt had been decided adversely to petitioners, and at the time of the filing of the petition the District Court of the United States, Northern District of Illinois,

had jurisdiction to adjudicate the American Bond & Mortgage Company a bankrupt. Appeal was taken by the petitioners from the order of April 6, 1932 (R. 262) and the final order of May 3, 1932 (R. 265).

In March, 1932, a hearing was had in the Maine District Court before Judge Peters to determine (in strict compliance with General Order No. 6) whether the administration should be had in Maine where the company had a charter only or in Illinois where it had its principal place of business for many years. The hearing resulted in an order by the Maine District Court that the interests of all concerned required the administration to be had in Illinois. See *In re American Bond & Mortgage Company*, 58 Fed. (2d) 379.

Counsel then appealed from the *order of transfer* to the First Circuit Court of Appeals where that phase of the case is now under advisement.

Following the order of transfer entered in Maine the Seventh Circuit Court of Appeals upheld the adjudication in the voluntary case.

The involuntary case in the Illinois District is pending, has not been abandoned, but is "stayed" upon Appellants' motion under General Order No. 6, awaiting final determination in the First Circuit of Judge Peters' order of transfer.

APPENDIX B.

"*Title 11, U. S. C. Section 11. Courts; jurisdiction and powers.* * * * (1) adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or greater portion thereof, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdictions."

"*Title 11, U. S. C. Section 47, 1932 Cumulative Annual Pocket Part. Same; appellate jurisdiction.* * * * (b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court. (As amended May 27, 1926, c. 406, sec. 9, 44 Stat. 664.)"

"*Title 11, U. S. C. Section 48, 1932 Cumulative Annual Pocket Part. Appeals.* (a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) From a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be. * * * (As amended May 27, 1926, c. 406, sec. 10, 44 Stat. 665.)"

APPENDIX C.

Rights of Minority Stockholders.

Sec. 63. Corporation not to sell franchises or entire property without consent of stockholders. R. S. c. 51, sec. 60. 1929, c. 242.

No corporation shall sell, lease, consolidate or in any manner part with its franchises, or its entire property, or any of its property, corporate rights or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, except with the consent of its stockholders at an annual or special meeting, the call for which shall give notice of the proposed sale, lease or consolidation. All such sales, leases and consolidations shall be subject to the provisions of this and the eleven following sections, and to the prior lien of stockholders as therein defined. Except as to franchises, this and the eleven following sections shall not be held to apply to mortgages or corporation property.

To effect a consolidation under the provisions of the foregoing paragraph and subject to the provisions of this and the eleven following sections, any two or more corporations organized or to be organized under the provisions of this chapter or existing under the laws of this state, or any corporation or corporations organized or to be organized under the provisions of this chapter or existing under the laws of this state and any corporation or corporations organized under the laws of any other state, may consolidate into a single corporation which may be either one of said corporations, provided the same be a corporation originally organized under the laws of this state, or a new corporation under the laws of this state to be formed by means of such consolidation, by entering into an agreement duly authorized by a majority of the directors of the respective corporations and signed by the duly authorized officers, and under the respective seals of said corporations, prescribing the terms and conditions of the consolidation, the mode of carrying the same into effect, whether or not the consolidated corporation shall be one of the constitutent corporations or a new corporation created by such consolidation, and stating in such altered form as the circumstances of the case may require such other facts as are necessary to be set out in the certificate of organization of corporations organized under this chapter and as are pertinent in the case of a consoli-

dation, the manner of converting the capital stock of each of such consolidating corporations into the stock or obligations of such consolidated corporation together with such other provisions and details as shall be deemed necessary to perfect the consolidation. Said agreement shall be acknowledged by one of the executing officers of each of the consolidating corporations before an officer authorized by the laws of this state to take acknowledgments of deeds, to be the respective act, deed and agreement of each of said corporations.

Subject to provisions of by-laws with reference to closing stock-books prior to stockholders' meetings, said consolidation agreement shall be submitted to the stockholders of record of each corporation at a meeting thereof called separately for the purpose of taking the same into consideration, and at said meeting a vote in person or by proxy shall be taken for the adoption or rejection of said agreement, and if the votes of stockholders of each corporation representing a majority of the voting power, on a proposal to consolidate said corporation with another, shall be for the adoption of said agreement, then that fact shall be certified on said agreement by the clerk or secretary of each corporation and the agreement so signed, acknowledged, adopted and certified, after it has been examined by the attorney-general, and been by him certified to be properly drawn and signed and to be conformable to the constitution and laws of this state, shall be recorded in the registry of deeds in the county where the said consolidated corporation is located, and within sixty days after the day of the meeting at which said consolidation agreement is adopted by the stockholders, a copy thereof certified by such register shall be filed in the office of the secretary of state, who shall enter the date of filing thereon, and on the original agreement, certified as aforesaid, to be kept by the consolidated corporation, and shall record said copy. From the time of filing the copy of such agreement in the office of the secretary of state, said agreement shall be taken and deemed to be the agreement and act of consolidation of the said corporations and said original consolidation agreement or a certified copy thereof shall be evidence of the existence of such consolidated corporation and of the observance and performance of all acts and conditions necessary to have been observed and performed precedent to such consolidation. When said agreement is

so signed, acknowledged, adopted, recorded and filed, the separate existence of all of the constituent corporations, or all of such constituent corporations except the one into which such constituent corporations shall have been consoliated, shall cease, and the constituent corporations, whether consolidated into a new corporation or merged into one of such constituent corporations, as the case may be, shall become the consolidated corporation by the name provided in said agreement, possessing all the rights, privileges, powers, franchises and immunities as well of a public as of a private nature, and being subject to all the liabilities, restrictions and duties of each of such corporations so consolidated and all and singular the rights, privileges, powers, franchises and immunities of each of said corporations, and all property, real, personal and mixed, and all debts due to any of said constitutent corporations on whatever account, and all other things in action of or belonging to each of said corporations, shall be vested in the consolidated corporation; and all property, rights, privileges, powers, franchises and immunities, and all and every other interest shall be thereafter as effectually the property of the consolidated corporation as they were of the several and respective constituent corporations, and the title to any real estate, whether by deed or otherwise, under the laws of this state, vested in any of such constituent corporations, shall not revert or be in any way impaired by reason thereof; provided, that all rights of creditors and all liens upon the property of any of said constituent corporations shall be preserved unimpaired, limited to the property affected by such liens at the time of the consolidation, and all debts, liabilties and duties of the respective constituent corporations shall thenceforth attach to said consolidated corporation and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

The notice herein provided for shall be given to all stockholders of record of all of the consolidating corporations, whether or not entitled to vote, but subject to any by-law provisions with reference to closing stock-books prior to stockholders' meetings. If the holder of record of any share not entitled to vote in any constituent corporation selling, leasing, consolidating, or otherwise disposing of its prop-

erty as aforesaid, shall at or prior to the taking of the vote, dissent therefrom in writing and shall at such time, or within one month from the date of such vote, file his written dissent therefrom with the president, clerk or treasurer of such corporation, then such non-voting shares of such stockholder shall be subject to and be entitled to all of the rights granted by the eleven following sections in like manner as if they had been voting shares.

If the location of the consolidated corporation is not the same as that of the constituent corporations, then the clerk of the consolidated corporation shall within sixty days after such consolidation has become effective file a certificate of the consolidation, setting forth the names and locations of the consolidated and constituent corporations, in the registry of deeds of each county, other than that of the consolidated corporation, where the constituent corporations may be located.

The provisions of this section with reference to consolidation shall neither restrict nor enlarge the provisions of section one of chapter sixty-eight and section forty-four of chapter sixty-two as now amended.

Sec. 64. Remedy of dissenting stockholder. R. S. c. 51, sec. 61. If any stockholder in any corporation which shall vote to sell, lease, consolidate, or in any manner part with its franchises, or its entire property, or any of its property, corporate rights, or privileges essential to the conduct of its corporate business and purposes, otherwise than in the ordinary and usual course of its business, shall vote in the negative and shall file his written dissent therefrom with the president, clerk, or treasurer of such corporation within one month from the day of such vote the corporation in which he is a stockholder may within one month after such dissent is so filed, enter a petition with the supreme judicial court, or the superior court, sitting in equity, in the county where it held its last annual meeting, in term time or in vacation, setting forth in substance the material facts of the transaction, the action of the corporation thereon, the names and residences of all dissenting stockholders whose dissents were so filed, making such dissenting stockholders parties thereto, and praying that the value of the shares of such dissenting stockholders may be determined, and for other appropriate relief.

Sec. 65. If corporation fails to enter petition, dissenting stockholder may enter and prosecute the same. R. S. c. 51, sec. 62. If any such corporation shall fail to enter such petition as aforesaid, any stockholder dissenting as aforesaid may within one month thereafter enter such petition and prosecute the same, making such corporation party defendant. In either case the court shall fix the time of hearing and shall order notice thereof to all parties interested, by publication in some newspaper or newspapers at least two weeks successively, and such personal service as is required upon bills in equity.

Sec. 66. Court to determine value of shares and secure rights of stockholders; corporation to deposit amount of award in some bank; shares to become property of corporation. R. S. c. 51, sec. 63. The court, or any justice thereof in term time or in vacation, shall hear the parties and determine as soon as practicable the value of the stock of such dissenting stockholders; and shall make and enforce all such orders and decrees as may be necesary to secure to such stockholders all their rights. Such corporation shall, notwithstanding any appeal as hereinafter authorized, forthwith deposit the amount so awarded, in some bank or trust company designated by the court, to be by it held until final judgment, and paid to the parties as thereafterwards ordered by the court directing such deposit. Upon such deposit and upon compliance with final judgment as hereinafter provided, the shares of such stockholders shall become the property of such corporation, and the court may make and enforce such orders as may be necessary to secure its title thereto.

Sec. 67. Either party may enter appeal, and trial had before a jury; award, how paid; appellant to have lien on property of corporation. R. S. c. 51, sec. 64. Within thirty days after filing the decree determining such values, as aforesaid, either party may enter an appeal therefrom, to be heard at the next term of the superior court in the county where such petition is pending. The issue may thereupon, at the request of any party thereto, be submitted to a jury. If upon such trial the amount of such award is increased, the stockholder shall have judgment and execution against the petitioning corporation or corporation defending, for

such increase with interest and costs; and if decreased, such corporation may withdraw from said deposit, the amount of the decrease with interest and costs. During the pendency of such appeal, the appellant shall have a lien upon all the property of the corporation interested in such sale or lease, or consolidation for thirty days after judgment on appeal. Such lien shall have precedence over any mortgages or leases made after any vote of sale, lease or consolidation. All such liens may be released upon filing with the court, a bond in such amount and with such sureties as the court may approve. Two or more stockholders may join in the same appeal.

Sec. 68. If dissent is not filed, stockholder to be deemed to have assented; guardian may be appointed for incapacitated stockholder. R. S. c. 51, sec. 65. Any stockholder failing to file his dissent as required in section sixty-four shall be deemed to have assented to such vote. If it appears that any stockholder is legally incapacitated from giving such assent or waiver, the court shall appoint suitable guardians or representatives for such persons, and the case shall then be heard and determined as if such stockholders had filed their dissent as required by section sixty-four. Provided, however, that, if the proceedings hereby authorized are not had, then as against any stockholder who is a minor, or otherwise legally incapacitated, and who has no guardian, the period of one month in which to file the written dissents aforesaid shall not begin to run until the removal of the incapacity, by the appointment of a guardian or otherwise and actual notice of the vote of sale, lease or consolidation.

Sec. 69. Stockholders to deposit in court certificates of shares; transfers to be subject to final decree. R. S. c. 51, sec. 66. Every stockholder appearing in answer to, or filing any petition, by himself, guardian, or other legal representative, shall simultaneously therewith or within such time as the court may allow, deposit in court his certificate of shares duly indorsed to the corporation of which he is a shareholder, or some other sufficient transfer thereof, which shall there remain subject to the order of the court. All attachments and transfers of such shares shall be subject to the final decrees in such proceeding; and any such attach-

ing creditor or transferee shall be allowed to become a party to the proceedings to protect his interests; and if such person, so claiming under such transfer or attachment omits or fails to intervene in such proceedings, his omission as a party shall not bar or impair the proceedings.

Sec. 70. If corporation fails to pay amount decreed, rights of stockholder; lien of dissenting stockholder. R. S. c. 51, sec. 67. If none of the corporations interested in such petition shall pay or deposit the amount as herein ascertained and decreed, with interest thereon, within such time as the court shall order, any stockholder, entitled to such amount, may at his option take judgment and execution therefor, with interest and costs, against such corporation or withdraw his stock aforesaid; and after such withdrawal or if said execution is returned unsatisfied within thirty days after judgment, the owner of such shares shall retain all the rights of a dissenting stockholder as though no proceedings had taken place. All stockholders entitled to a remedy hereunder, shall have a lien upon the property of the corporations in which they are stockholders which shall take precedence of all mortgages or leases, of any kind made after any vote of sale, lease or consolidation. Such liens may be released as provided in section sixty-seven.

Sec. 71. Court may hear and determine petitions, and make orders for enforcement of rights of all parties. R. S. c. 51, sec. 68. The supreme judicial court, or the superior court, or any justice thereof, may in term time or vacation hear and determine said petitions, and make all orders for giving notice to non-resident parties, and taking action with reference to them, for the enforcement of the rights of any party to the proceedings, for the consolidation of two or more petitions, for the payment of interest on the adjudged value of the shares, for the payment of dividends, pending the proceedings, for interest upon the deposit aforesaid, for the distribution of costs between the parties and for enforcing its orders and decrees, as are consistent with the principles of equity practice, and as the convenient and speedy settlement of the controversy may require.

Sec. 72. If petition fails for any matter of form, new petition may be filed. R. S. c. 51, sec. 69. If any petition shall fail for any matter of form, any party interested therein may file a new petition within two months thereafter. No petition shall be abated by the death of any party, but may thereupon be summarily revived by suggestion and amendment.

Sec. 73. Exceptions. R. S. c. 51, sec. 70. The proceedings hereby authorized shall not apply to nor affect any special act relating to the rights of minority stockholders in any particular corporations enacted before the fourth day of April, eighteen hundred ninety-one, nor any mortgage legally made.

Sec. 74. Proceedings for valuing stock under the laws of other states to be a bar to any under this chapter. R. S. c. 51, sec. 71. If either of the corporations interested has consolidated its stock with corporations created by any other state or states, or the stock therein is held by virtue of concurrent legislation of one or more states, and proceedings have been commenced for valuing the stock and paying the value thereof in any state having jurisdiction, such proceedings shall, while pending, be a bar to any under this chapter; but if such proceedings in any other state shall fail for any reason not touching the merits, a petition may be filed as herein provided within two months thereafter.